Ameron Pipe Products *and* Boilermakers Local #72, International Brotherhood of Boilermakers, Blacksmiths, Iron Ship Builders, Forgers and Helpers, AFL–CIO. Case 36–CA–5552

September 30, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On April 13, 1988, Administrative Law Judge Richard D. Taplitz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] We agree with the judge's conclusion that the Respondent had no obligation to provide the Union with the financial information requested.

The judge found that the Respondent supplied the Union with information regarding its claim that the extant wages and benefits had caused it to be noncompetitive. We do not pass on the judge's suggestion that the Respondent was *required* to supply this information to the Union.

Dale Cubbison, Esq., for the General Counsel.
Kyle D. Brown, Esq. (Hill, Farrer & Burrill), of Los Angeles, California, for the Company.
Robert N. Plympton, of Portland, Oregon, for the Union.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge. This case was tried in Portland, Oregon, on January 20, 1988. The charge in Case 36–CA–5552 was filed on March 9, 1987, by Boilermakers Local #72, International Brotherhood of Boilermakers, Blacksmiths, Iron Ship Builders, Forgers & Helpers, AFL–CIO (Local 72). The complaint and amended complaint issued respectively on April 14 and June 30, 1987, alleging that Ameron Pipe Products (the Company) violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended.[1]

[1] The amended complaint was accompanied by an order consolidating Cases 36–CA–5552 and 36–CA–5598. On July 15, 1987, the Regional Office approved an informal settlement agreement resolving the issues raised in the amended complaint. On September 15, 1987, approval of that settlement agreement was withdrawn. The Company does not take the position that the settlement agreement was improperly withdrawn and therefore that issue has not been addressed. At the opening of the trial, counsel for the General Counsel stated that the issues involved in Case 36–CA–5598 had been settled. He moved to sever Case 36–CA–5598 from the consolidated complaint, for the dismissal of that charge on the basis of the settlement and for the deletion from the amended complaint of those matters which were raised by that charge. There was no opposition to the motion and it was granted. The only issue remaining to be litigated was that in Case 36–CA–5552, which involved the allegedly unlawful refusal of the Company to furnish the Union with financial information.

Issue

The sole issue is whether the Company violated Section 8(a)(5) and (1) of the Act by refusing to supply the Union with financial information. The Company contends that it had no duty to furnish such information because it had never claimed an inability to pay. The General Counsel contends that certain statements made by a company representative were tantamount to a plea of inability to pay even though the Company specifically denied such an inability.

All parties were given full opportunity to participate, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the Company and the Union.

On the entire record of the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Delaware corporation with an office and place of business in Portland, Oregon, is engaged in steel and concrete pipe fabrication. During the year preceding issuance of complaint the Company purchased and had delivered to its facilities in Oregon goods valued in excess of $50,000 directly from sources outside of Oregon, or from suppliers within Oregon which in turn obtained such goods from sources outside of Oregon. The complaint alleges, the answer admits, and I find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Local 72 is a member of the Metal Trades Council of Oregon (the Union). The Union is a labor organization within the meaning of Section 2(5) of the Act. Local 72 has authorized the Union to bargain on its behalf.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Sequence of Events*

The Company is a large manufacturer of construction products. It has approximately 20 production facilities in the United States and about 20 others overseas. Its annual sales are in excess of $300 million. All but 3 of its plants in the United States are unionized and the Company deals with 18 different International unions and negotiates 20 or 30 contracts. One of the Company's facilities is located in Portland, Oregon (the Portland plant), where it manufactures concrete reinforced pipe that is used for water transmission lines. The Portland plant has been in operation for 48 years. Its primary customers are Federal and state water agencies.

Over the years, the nature of the work at the Portland plant has changed. At one time it manufactured offshore drilling rigs and it employed 300 or 400 boilermakers. At the times relevant here the Portland plant was manufacturing concrete reinforced pipe with a much smaller work force. It employed 30 to 35 people in the classification of metal tradesmen. One of those was an electrician, two were painters and the balance were boilermakers. The Union represents those metal tradesmen.[2] In addition, teamsters and laborers are employed at the Portland plant. The total work force is about 40 employees. The teamsters and the laborers are represented by labor organizations other than the Union. Though the complaint alleges that the appropriate unit consists of all production and maintenance employees, it appears that the parties agree that teamsters and laborers should not be included in the bargaining unit.

For about 20 years the Union has been the exclusive collective-bargaining representative of the Company's metal trades employees at the Portland plant. The Company and the Union have had a series of successive collective-bargaining agreements, the most recent of which expired by its terms on October 1, 1986. Before the expiration of that contract, the parties began bargaining for a new agreement. No agreement has yet been reached.

Before the bargaining for a new contract began, an incident occurred with one of the principal competitors of the Company which was discussed at length during the negotiations. That competitor was Northwest Pipe and Casing (Northwest Pipe). The Company and Northwest Pipe often bid on the same jobs. In 1986 Northwest Pipe was in a Chapter 11 bankruptcy proceeding. For about 20 years before then, the Union had a contract with Northwest Pipe covering all of Northwest Pipe's employees, many of whom were boilermakers. Negotiations between the Union and Northwest Pipe continued during the middle of 1986 until an impasse was reached. On July 14, 1986 Northwest Pipe unilaterally implemented the terms of the last offer it had made to the Union. The unilateral change brought down Northwest Pipe's average wage from $12.48 an hour to $10 an hour, except for a few employees who had special skills. At that time the Company (Ameron) was paying $12.68 an hour for boilermakers.

The Company and the Union met on September 25, 1986 to begin negotiations for a new agreement. Robert N. Plympton, the Union's business manager, was the Union's principal spokesman at that meeting. Michael Fahey, the executive secretary of the Metal Trades Council, as well as two other representatives of the Union, were also there. George J. Fischer, the Company's director of labor relations, was the Company's chief spokesman. Company Production Manager Bob Hasbrouck, as well as Company Official Jay Morrison, were also present. After discussing a 30-day extension of the contract, Fischer said that the Company should be more competitive and that the Northwest Pipe contract gave Northwest Pipe a competitive edge over the Company. Plympton replied that Northwest Pipe did not have a contract and he took the position that Northwest Pipe paid the same for all crafts while the Company had different wage scales for laborers, teamsters, and boilermakers. Fischer said that the Company had always been competitive with area rates and that consideration should be given to the fact that rates were diminishing in the area. Plympton replied that the Company was not going to get any concessions unless it opened its books. Plympton also said that the Union was still bargaining with Northwest Pipe and that the $10-an-hour rate for Northwest Pipe was not going to be final.[3]

The next meeting was held on October 21, 1986. Plympton did not attend that meeting. Instead, he reported to the Union's president and business agent Robert C. Pearse that at the September 25 meeting the Company had complained that it was not competitive and that it wanted to have the Northwest Pipe agreement. Pearse attended the October 21, 1986 meeting as chief spokesman for the Union. Fischer and Hasbrouck were there for the Company. Fischer said that the general state of the economy was poor, that the Company was not competitive and that the Company needed the Northwest Pipe agreement. Pearse replied that Northwest Pipe did not have a contract but had simply implemented its last offer. Fischer said that it did not matter and that the Company still had to compete against Northwest Pipe. Pearse asked whether the Company was in Chapter 11 and Fischer replied that it was not. Pearse asked whether the Company was pleading poverty and Fischer replied that it was not and that it was only talking about matching area rates.

During the course of the October 21, 1986 meeting, Fischer handed Pearse two documents in an attempt to substantiate the Company's claim that it was not competitive. The first was captioned Ameron–Concrete Pipe Group, Northwest Division. It showed the inch/feet produced (diameter of pipe in inches times length of pipe in feet), the average number of employees, the hours worked, and the equivalent man years for each of the years 1972 through 1985 and projections of those figures for the years 1986 and 1987. There were a number of ups and downs between 1972 and 1987 but for the more recent years the figures showed 6.9 million inch/feet for 1984, 5.2 million for 1985, 3.4 million for 1986, and 2.5 million for 1987.[4] The second document was entitled ''List of Work We Have Lost to Competition.'' That document showed jobs that the Company had bid on in 1983, 1984, 1985 and 1986 which had been awarded to competitors. The names of the competitors and the dollar amounts were also listed. Sixteen lost jobs were reported in all. Eleven of those jobs were awarded to Northwest Pipe, the last of which was a job in 1986 in Anchorage, Alaska for $4,300,000. In all the jobs that the Company had bid on that were awarded to Northwest Pipe were valued at $13,485,000.

Pearse candidly admitted that at a number of meetings and in a number of different ways he asked Fischer whether the Company was pleading poverty and that Fischer consistently responded that it was not pleading poverty or inability to pay and that it was claiming that the Company was not competi-

[2] The Company alleges, and the answer admits that the following employees of the Company constitute a unit appropriate for the purpose of collective bargaining:

> All production and maintenance employees employed by the Company at its Portland, Oregon location, excluding office clerical employees, professional employees, guards, supervisors as defined by the Act and all other employees.

[3] These findings are based on the testimony of Fischer and Plympton. They emphasized different points but their testimony was basically consistent.

[4] Fischer credibly testified that it later turned out that the projections for 1987 were unduly optimistic and that there was even less production and fewer employees.

tive. Pearse testified ''My knowledge of Board law is such that I believe that, when a Company says they are not competitive, it's the same thing as pleading poverty.'' The charge is consistent with that theory. It alleges that the Company repeatedly insisted that it needed wage concessions to become competitive and that it refused to bargain by failing to furnish the Union with requested financial information. The amended complaint is less forthright. It simply states that the Union requested financial records that it needed to perform its collective-bargaining function, and that the Company refused to furnish that information. There is no reference to the Company's position with regard to either the ability to pay or a desire to remain competitive.

The parties met again on October 22, 1986. Pearse, on behalf of the Union, proposed a 30-month agreement with an 18-month wage freeze at the current levels and a 3-percent increase on April 1, 1988. The Union also made a number of other proposals relating to such things as training programs and health and welfare. The Company did not agree to the Union's proposals. The Company continued to insist on competitiveness. Pearse replied that it would be very hard to sell concessions to the union members because the Company was not pleading poverty but was instead just pleading noncompetitiveness.[5]

After the meeting ended Pearse had a conversation with Fischer in which Fischer said that the Company was not competitive, that it wanted to get competitive and that the Union was holding up that process. They spoke about parity with Northwest Pipe and Pearse said that there might be some middle ground and that they should be creative.

The next meeting was scheduled to take place November 25, 1986. Fischer went to the place the meeting was to be held but no one from the Union appeared. Pearse was physically unable to attend and Plympton was out of town. No one from the Union notified the Company that the meeting was to be canceled.

Another meeting was scheduled for January 19, 1987, at the Federal mediator's office. Once again Fischer was the spokesman for the Company and Pearse was the spokesman for the Union. At that meeting Fischer gave the Union a written proposal calling for a 20-percent rollback in pay for all classifications except for one highly skilled group of machine operators. The proposal also provided for a reinstatement of 3 percent in the second and third year of the contract. The Union did not accept the proposal.[6]

The next meeting was held on February 17, 1987. Between the January 19 and the February 17 meeting, the Union sent the Company eight separate letters asking the Company to explain proposals and to give information. Much of the information had already been given to Pearse across the bargaining table.[7] The February 17, 1987 meeting took place in the mediator's office with both Plympton and Pearse representing the Union. Nothing of substance was accomplished at that meeting.

Sometime in mid-February 1987 a company representative, Roy Meckley, held a meeting with 30 employees. Fischer was present during that meeting. Meckley told the employees that prospects in the foreseeable future for added work were somewhat dim, and that there was going to be a scramble because there was less work and more competition. He then turned the meeting over to Fischer. Fischer told the employees that the reductions the Company sought would allow the Company to continue to work and to keep the doors open and that if the Company got the reductions in pay and became competitive, employees would be able to pay their bills and put beans on the table.[8]

On February 23, 1987, Fischer sent a letter to Michael Fahey, the executive secretary of the Metal Trades Council. Fahey attended some of the negotiating sessions but was not a union spokesman. A copy of the letter was sent to Plympton. The letter stated:

> We are seriously concerned and upset over the total lack of progress being made in current negotiations, in particular with the Union's reputed failure to fulfill its commitments or show willingness to assist in keeping this Portland facility in business. We have made repeated efforts to discuss the few issues before us and are faced with the necessity of implementing cost-saving measures if we are going to be able to survive in the future.

The letter refers to the Company's willingness to reach an agreement on wage rates somewhere between a $10 rate and the $12.68 rate the Company was paying; and it states that the Company gave the Union ''information relative to the poor business prospects, jobs we bid but lost to competitors with preferential rates, statistical comparison of Inch Feet Produced, Average Number of Employees and Hours Worked dating back to 1972.'' The letter also mentions ''our dire need for relief in order to survive.'' The letter goes on to say:

> We are experiencing the most severe business recession of the past 20 or 30 years. We are, indeed, in a survival mode, not unlike many other companies in the area. We

[5] This finding is based on the credited testimony of Pearse. Pearse also acknowledged in his testimony that Fischer never said that the Company was losing money or that the Company was in the red and that he kept repeating that the Company was not competitive.

[6] Pearse testified that Fischer told the Union that the Company's offer was its last, best, and final offer and that it would be implemented within 10 days. Fischer testified that nothing was said about implementation because he was waiting for the Union to respond at the next meeting. I believe that Fischer's memory was more accurate than Pearse's on that point and I therefore credit Fischer. In any event the Company did not implement its proposal. As of the date of the trial it was still paying the rates set forth in the expired contract.

[7] The refusal to furnish financial information, which is alleged to be a violation of the Act in the complaint, is not predicated on any of those requests. General Counsel stated on the record that the demand for information, which triggered the allegedly unlawful refusal to furnish information, was made in a union letter dated March 4, 1987.

[8] The findings with regard to what Fischer said are based on the credited testimony of Roy Speers, an employee who attended the meeting. Fischer in his testimony denied that he spoke about keeping the doors open or about employees paying their bills and putting beans on the table. He averred that he told the employees that the Company had proposed to the Union that there be parity with Northwest Pipe and that the Company had lost a big job to Northwest Pipe in July. Both Fischer and Speers appeared from their demeanor to be fully credible witnesses. However the tenor of the remarks attributed to Fischer by Speers is consistent with the letter Fischer wrote to Fahey on February 23, 1987 (discussed below), and I therefore credit Speers.

> need wage concessions to stay in business. We need to do something soon or little work could turn out to be no work.

The next meeting took place on March 4, 1987, at the mediator's office. There was talk about seniority, welding tests and other matters and the Union raised some new language proposals. The Company continued to say that it had to have concessions to be competitive. During the course of that meeting Plympton handed Fischer a letter dated March 4, 1987. That letter referred to the Company's February 23, 1987 letter to the Union and said that the Company was ''complaining about '. . . poor business prospects, jobs we bid but lost to competitors with preferential rates . . . our dire need for relief in order to survive.''' The March 4, 1987 letter went on to state that the Company had ''crossed the threshold and was now within the area which the Board has ruled entitles us to financial information.'' The letter requested ''access to your books, records, tax returns, and other financial data as are necessary to analyze your actual fiscal condition.'' The letter also stated: ''While the bulk of our detailed investigation will concentrate on your Portland operation, a more generalized overview of Ameron's Cement Division will aid in creating a proper context in which we can judge your competitive position. Therefore, we are requesting the above information be made available to us at the earliest possible date.''

Fischer said that the Company would not show the Union its books and Pearse replied that the Union could not engage in concession bargaining or understand the Company's proposal with regard to competitiveness without the information. Fischer repeated that the Union was not going to look at the books. The Company has not furnished the information requested in the March 4 letter.

In a letter dated March 9, 1987, from Fischer to Plympton, the Company replied to the Union's March 4 demand for information. The letter stated:

> In reply to your letter of March 4, 1987, it is clear to Ameron that, intentionally or otherwise, you persist in your complete misunderstanding or misinterpretation of the Company's bargaining position in connection with our Portland plant negotiations.
>
> The Company has never at any time during these negotiations claimed or asserted a present inability to pay regarding any economic item in dispute. In fact, it is inconceivable that the union could understand otherwise given our consistent and often-repeated position that your permitting a competitor to bid against us at lower labor rates is the basis for our bargaining demands.
>
> We reiterate what Ameron has stated throughout the negotiations; Ameron's position is that it will not pay more than competitive rates, not that Ameron cannot afford to pay higher rates. Ameron is not claiming financial inability to pay, rather Ameron will not voluntarily pay uncompetitive rates. We have pointed out to you that Ameron has recently lost out on major projects such as Phase 4 of the Eklutna Water Project in Alaska and stands in great danger of losing future bids to competitors such as Northwest Pipe who are paying substantially lower wage rates to their metal tradesmen. The economic relief we seek will simply place Ameron on an equal footing with its competition in the marketplace. Our focus is on the future and our position has nothing whatsoever to do with whether Ameron is currently able to continue to pay existing wages and benefits.
>
> Your insistence on financial data from Ameron as a pre-condition to further economic bargaining is, therefore, wholly inappropriate. Ameron requests that you immediately discontinue your demand for financial information and that you immediately return to the bargaining table to resume good faith negotiations for a labor agreement.

B. *Analysis and Conclusions*

The general principles of law applicable to this case were summarized by the Board in *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984), where it was held:

> Unions have a presumptive right to certain information about unit employees, such as wage rates. *Whitin Machine Works*, 108 NLRB 1537 (1954), enfd. 217 F.2d 593 (4th Cir. 1954), cert. denied 349 U.S. 905 (1955). The rule, however, is different for profit data or other aspects of an employer's financial condition. The union must show a specific need for the information in each particular case; profit data will not be required merely because it would be ''helpful'' to the union. See *United Furniture Workers of America (White Furniture Co.) v. NLRB*, 388 F.2d 880 (4th Cir. 1967). An employer may, however, provide justification for requiring profit data to be furnished by claiming financial inability to meet the union's demands. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). In *Truitt*, the Supreme Court held that a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of failure to bargain in good faith, as follows (at 152–153):
>
> > Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.
>
> The *Truitt* court added (at 153):
>
> > We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts.[7]
>
> Inability to pay need not be expressed with any particular magic words. *Monarch Machine Tool Co.*, 227 NLRB 1265 (1977). See also *Printing Pressmen Local 51 (Milbin Printing) v. NLRB*, 538 F.2d 496, 500 (2d Cir. 1976) (If the ''Employer's refusal reasonably interpreted is the result of financial inability to meet the employees' demand rather than simple unwillingness to do so, the exact formulation used by the Employer in converying this message is immaterial.''); and *NLRB v. Unoco Apparel*, 508 F.2d 1368, 1370 (5th Cir. 1975)

(Statement that ''employees came to the wrong well . . . the well is dry'' constituted a claim of financial inability to afford wage increase.).

Contrary to the judge we find that the Respondent's statements to the Union in the course of bargaining did not amount to a claim of an inability to pay wage increases. Thus *Truitt* does not mandate that the Company provide the Union the requested financial information.

Although no magic words are required to express an inability to pay, the words and conduct must be specific enough to convey such a meaning.

[7] Although the Court limited its holding, the case has become widely accepted as establishing for all practical purposes such an ''automatic'' rule. See *Telepromoter Corp. v. NLRB*, 570 F.2d 4, 9 fn. 2 (1st Cir. 1977), citing, inter alia, *C-B Buick v. NLRB*, 506 F.2d 1086, 1091 (3d Cir. 1974); *NLRB v. Southland Cork Co.*, 342 F.2d 702, 706 (4th Cir. 1965).

In that case the employer characterized the union's wage proposals as excessive, discussed the economy in general, and noted that some unions in other industries were making financial concessions. The employer also initially denied that the hotel had made a profit during a certain period of time but later the employer would not ''deny it or confirm it.'' The employer also stated that it was not necessarily true that the hotel was making money or that it was full or would stay full and that the future was uncertain. The Board noted that the company asserted that it ''would'' not give a wage increase and held that the distinction between ''would not'' and ''could not'' was critical because ''words conveying simply unwillingness to meet the employees' demands, rather than inability to do so, do not invoke a *Truitt* obligation.'' In dismissing the complaint the Board refused to adopt the administrative law judge's conclusion that the statements of the employer amounted to a claim of inability to pay.

In *Craig & Hamilton Meat Co.*, 271 NLRB 853 (1984), the Board emphasized the point that the statements of an employer, which arguably could trigger a duty to supply information, had to be viewed in their total context. There an employer told the union that it did ''not intend to be another of the 800,000 business casualties this year.'' The Board stated that removed from context, that statement appeared to support the General Counsel's contention that the employer had put its general financial condition at issue. However the Board noted that the remark about business casualties when put in context focused on the employer's resolve to ''gird for the continuing tough competition ahead'' and was expressing the employer's concern over potentially harmful consequences that would result from a failure to respond to industry trends. The Board held that placed in context the employer's remarks were not of such a nature as to require the type of financial information requested by the union. Administrative Law Judge Jay Pollack, in his decision which was adopted by the Board, made it clear that where an employer makes a claim in bargaining that requires substantiation, the union's demand for information must be honored only to the extent that it pertains to the claim advanced by the employer. A claim by an employer of noncompetitiveness requires substantiation of that claim[9] but it does not necessarily require the submission of general financial information. As Judge Pollack stated:

> Had the Union requested that Respondent substantiate its claims regarding its changing role in the industry, this case would be very different. However, the information requested by the Union was not relevant to Respondent's bargaining stance. It is this deficiency in the case that the General Counsel has failed to address. While the General Counsel has focused on Respondent's assertions during bargaining, she has simply assumed that the information requested was relevant to ''supporting and verifying Respondent's economic claims that future economic circumstances compel present wage concessions in order to remain competitive.'' As can be readily seen, the information requested is relevant to Respondent's general financial health. However, Respondent never put its financial health in

[9] In *IT&T*, 159 NLRB 1757, 1790 (1966), enf. in pertinent part 382 F.2d 366 (3d Cir. 1967), cert. denied 389 U.S. 1039 (1968), the Board adopted the administrative law judge's decision which held:

> I am satisfied . . . that Respondent made it sufficiently clear during the negotiations that it was not claiming that it lacked the wherewithal to continue to pay the cost of the existing fringe benefits, but only that it deemed its fringe benefits to be so far out of line with those of its competitors as to be responsible for its loss of contracts to them. In any case, it is clear from Respondent's December 10 letter that that is its present position. At one point Respondent had referred to its ''fight for survival. Even so, it is well settled that an employer may be required to document not only a plea of inability to pay, but also a plea that his competitive position is adversely affected by his high labor costs.
>
> In any case, it is clear that the Supreme Court's rationale in the *Truitt* case—that good-faith bargaining requires that a bargainer's claim ''be honest claims,'' and that he be willing to support them by proof of their accuracy—is not in terms limited to a plea of inability to pay but would seem to apply with equal force to any assertion by a party in support of a bargaining demand, which is susceptible of documentation by data available to it and not available to the other party. Respondent's claim here of the worsening of its competitive position by its past liberality in the matter of fringe benefits was such an assertion and was susceptible of such documentation. It may be pointed out, however, that the nature of the data that a respondent may be required to produce may well be different when he pleads that he does not have the present means to pay certain benefits and when, as here, he complains only that the payment of existing benefits has caused him to lose contracts to competitors. While, in the former case, the union would be entitled to an order requiring disclosure of all books and records relating to the respondent's financial status, in the latter case it would seem that the appropriate remedy would be to compel disclosure of only such data as the employer relied on in asserting that his competitive position had been so impaired by his generosity to his employees that he had lost out in bidding for contracts. Applying those principles here, I find that the Union was entitled to disclosure of the names of those competitors of Respondent whose fringe benefits were alleged to be lower than Respondent's and of the identity of all contracts allegedly lost during the term of the expiring collective-bargaining agreements because of underbidding by such competitors, together with any other data in Respondent's possession on which it relied in reaching the conclusion that such contracts were lost because of its relatively high fringe benefits or other labor costs.

> issue, rather it placed its changing role from processor to jobber in issue. The requested information apparently was not intended to and does not pertain to the claim advanced by Respondent during negotiations. Footnote omitted.
>
> In this case, the Union's request did not meet Respondent's assertions regarding its competitors' operations or its change in operation from processing to jobbing. The information requested would not reasonably be expected to show the accuracy or inaccuracy of Respondent's claims. Thus, the information could not be said to be relevant to the instant negotiations. It follows that Respondent could not be found to have violated its statutory obligation to bargain in good faith by failing to provide the information requested.

In light of the two cases cited above, it is necessary to take a close look at exactly what the Company was claiming and exactly what the Union was seeking. At the negotiating sessions the Company repeatedly told the Union that one of its principal competitors, Northwest Pipe, was paying substantially less for boilermakers than it was; that the Company had customarily paid prevailing rates; and that it wanted to remain competitive. The Union repeatedly asked whether the Company was claiming inability to pay and the Company in the most unequivocal fashion denied that it was making any such claim. The Company's February 23, 1987 letter to the Union does refer to the Company's dire need for relief in order to survive. The letter also refers to a need for concessions to stay in business and goes on to add ''We need to do something soon or little work could turn out to be no work.'' Similar remarks were made to employees at a meeting. In substance the Company was saying that it had to remain competitive in order to obtain work when there was little work available and that unless it did become competitive, there would in the future be no work and therefore no workers. Nothing that the Company did or said could be reasonably interpreted as a claim of present inability to pay. It was all geared to an inability to obtain future work if it was not competitive. Even without being requested to do so, on October 21, 1986, the Company did supply information to support its claim. With regard to the claim that there was little work available, it supplied the Union with data showing the Company's production, average number of employees, hours worked and equivalent man years for the years 1972 to 1985. It provided projections to cover the years 1986 and 1987. The documents showed that production had substantially diminished. There was no showing as to whether the Company made or lost money on that reduced production but the Company never claimed that it had lost money. With regard to the Company's claim that it was not competitive, the Company supplied the Union with a ''list of work we have lost to competition.'' It showed 16 jobs that had been bid on but which had been awarded to others. During negotiations the Company had singled out Northwest Pipe as the principal competitor it was concerned with. The data supplied to the Union showed that 11 of the jobs that had been bid on by the Company had been awarded to Northwest Pipe and that the total value of those jobs was over $13 million. The Union was the collective-bargaining agent for Northwest Pipe's employees and was therefore fully aware of Northwest Pipe's wage structure. The Union knew that the wages of Northwest Pipe boilermakers were substantially less than that paid by the Company.

As indicated above none of the Company's claims related to its present, general financial position. The Union requested ''access to your books, records, tax returns, and other financial data as are necessary to analyze your actual fiscal condition.'' and also requested financial information that went beyond the Portland operation. The Union's request was not for information to support the Company's claims. That information had already been furnished on October 21, 1986. What the Union sought was present, general financial information. That information would do little to either support or refute the Company's claim that it would have difficulty obtaining future work if it was not competitive.

With regard to the ''would not'' or ''could not'' issue discussed in the above cases, both are, in a sense, present in the instant case. In context, the Company's claim was that it ''would not'' pay more than it was offering. That assertion was not subject to verification or refutation by examination of the Company books. The Company took that position because it believed it ''could not'' in the future secure work if it was not competitive. That projection of the future ability to obtain work was also not subject to affirmation or refutation by an inquiry into the Company's present, general financial condition.

Not all Board cases analyze the scope of the Union's demand for information in the light of the Company's specific claim with regard to noncompetitiveness as fully as was done in *Craig & Hamilton*, supra. In some cases the Board has in broad terms equated a claim of noncompetitiveness with a claim of inability to pay. See *Harvstone Mfg. Corp.*, 272 NLRB 939, 944 (1984), enf. denied in pertinent part 785 F.2d 570 (7th Cir. 1986), and cases cited therein. In other cases the Board has held that a claim of noncompetitiveness was not a claim of inability to pay and did not require an employer to divulge general financial information. *Buffalo Concrete*, 276 NLRB 839, 841 (1985);[10] *Empire Terminal*, 151 NLRB 1359, 1360 (1965), enf. 355 F.2d 842 (D.C. Cir. 1966); *Honaker*, 147 NLRB 1184 (1964). In another case the Board has held that the Company's claim that jobs would be lost and the Company would go out of business if its proposals were not met established that the Company was going beyond the expression of a mere unwillingness to pay and indicated an inability to pay which triggered a duty to disclose

[10] In that case the Board held:

> A review of the evidence reveals that during the entire bargaining process the Respondents maintained they needed takebacks to make them more competitive in the local industry. While referring to a general loss of jobs in the unionized sector of the industry, the Respondents stopped short of claiming they were *unable* to afford the Union's proposals.
>
> As set forth above, at the first negotiating session Willcox stated that unionized contractors were not competitive due to the large inroads into the industry made by the nonunion contractors. Willcox consistently repeated this theme throughout the entire bargaining process. At no time did the Respondents assert they were unable to pay what was required under the union contract proposals but rather consistently maintained they wanted to obtain a more competitive position in the industry. The Respondents thus had no *Truitt* obligation to provide the Union with all their financial records and therefore did not violate Section 8(a)(5) and (1) by refusing the Union's request for that information.

financial information. See also *Nielsen Lithographing Co.*, 279 NLRB 877 (1986), and cases cited therein. See also *Palomar Corp.*, 192 NLRB 592 (1971), enfd. 465 F.2d 731 (5th Cir. 1972); *Stanley Building Specialties Co.*, 166 NLRB 984 (1967), enfd. 401 F.2d 434 (D.C. Cir. 1968). The Board cases in this area are difficult to reconcile. In such circumstances, it is particularly important to consider the principles set forth by the Supreme Court in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). In *Truitt* the Supreme Court held that if a company claim (such as inability to pay) was important enough to present in a give-and-take of bargaining, it was important enough to require some sort of proof of its accuracy. Here the Company did make a claim with regard to competitiveness and then voluntarily offered proof of the accuracy of that claim. The Union in turn sought information as to the general financial condition of the Company that would not tend to either prove or disprove the Company's claim. The high court also pointed out that ''The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.'' Evaluating the Company's conduct as a whole, I am unable to find that it failed to bargain in good faith.[11] I therefore recommend that the complaint be dismissed in its entirety.

[11] The Union in its brief contends that the Company's February 23, 1987 letter was an unequivocal claim of inability to pay and that the Company's March 9 letter, even if it was an unequivocal withdrawal of that claim, could not ''put the bullet back in the gun.'' The Company, citing *IT&T*, supra at 1789–1790, and *Advertisers Mfg. Co.*, 275 NLRB 100, 101 (1985), contends that even if its March 9 letter constituted a withdrawal of such a claim, rather than a clarification and restatement of its prior claim relating to competitiveness, there would be no duty to supply general financial data after March 9 because such a duty exists only when that claim is outstanding. As I have found that under all the circumstances of this case the Company has not refused to bargain in good faith, that issue need not be reached.

CONCLUSION OF LAW

The General Counsel has not established by a preponderance of the credible evidence that the Company violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed in its entirety.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.